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10 FIRST FEDERAL BANK OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEBORAH E. JOHNSON and
GERALD D. JOHNSON,

Plaintiffs,

v.

FIRST FEDERAL BANK OF
CALIFORNIA,

Defendant.

CASE NO. C08-00264PVT

NOTICE OF MOTION AND MOTION
TO DISMISS PLAINTIFFS'
COMPLAINT FOR LACK OF
SUBJECT MATTER JURISDICTION
AND FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED; MEMORANDUM OF
POINTS AND AUTHORITIES AND
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT THEREOF

Hearing:

Date : March 4, 2008

Time: 10:00 a.m.

Courtroom: 5

Patricia V. Trumbell, Magistrate

**TO THIS HONORABLE COURT AND PLAINTIFFS, DEBORAH E.
JOHNSON AND GERALD D. JOHNSON:**

PLEASE TAKE NOTICE THAT on March 4, 2008, at 10:00 a.m. or as soon
thereafter as the matter may be heard in the above-entitled Court, located at 280 South
First Street, San Jose, California 95113, Defendant FIRST FEDERAL BANK OF
CALIFORNIA (hereinafter "FIRST FEDERAL") will and hereby does move this Court to
dismiss the Complaint filed by Plaintiffs DEBORAH E. JOHNSON and GERALD D.
JOHNSON (hereinafter referred to collectively as "Plaintiffs") in the instant action, with

1 prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) because
2 Plaintiffs lack standing to bring the claims, and the claims are barred by the one year
3 statute of limitations set forth in 15 U.S.C. §1640(e).

4 This Motion is based on this Notice of Motion and Motion, the Memorandum of
5 Points and Authorities and Request for Judicial Notice filed herewith and any further
6 evidence, oral or documentary, which may be presented at the hearing on this Motion.

7
8 DATED: January 28 2008

HEMAR, ROUSSO & HEALD, LLP

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10 By: Pamela L Cox
11 PAMELA L. COX
12 Attorneys for Defendant
13 FIRST FEDERAL BANK OF CALIFORNIA
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. The Allegations of the Complaint

In their Complaint, Plaintiffs DEBORAH JOHNSON and GERALD JOHNSON (“Plaintiffs”) allege that Defendant FIRST FEDERAL BANK OF CALIFORNIA (hereinafter the “Bank” or “Defendant”) violated the Home Ownership and Equity Protection Act (“HOEPA”) and Truth in Lending Act (“TILA”) in connection with the loan (the “Loan”) secured by Plaintiffs’ primary residence (the “Real Property”). (Complaint, ¶1). In the very next paragraph, Plaintiffs allege that their “damages . . . are being handled within this district’s Bankruptcy Court.” (Complaint, ¶2).

The Plaintiffs further allege in a summary fashion that the escrow documents, loan documents and correspondence related to their loan (which closed in May of 2005) with Defendant will show that “Defendant engaged in ‘Predatory Lending’ practices.” (Complaint, ¶4). Plaintiffs contend that these lending practices consisted of qualifying Plaintiff Deborah E. Johnson for a loan upon which she could only make the minimum payment, failing to disclose a high pre-payment penalty, and requiring Plaintiffs to convert unsecured debt to secured debt to receive a mortgage with a fixed interest rate of 5.7% for three years. *See id.*

Plaintiffs conclude their complaint by contending that the Defendant’s actions have caused them damages, and request that the court award monetary compensation, as well as allow Plaintiffs to sell or refinance their primary residence to avoid foreclosure. (Complaint, ¶¶6, 7).

B. Deborah E. Johnson’s Related Bankruptcy Filing

The loan secured by real property which is the subject of the instant action is currently the subject of Deborah E. Johnson’s bankruptcy case. (See Request for Judicial Notice). Ms. Johnson filed her Chapter 13 proceeding on November 7, 2007 at case number 07-53614. In her schedules, Ms. Johnson listed the Real Property as an asset, and

1 the debt to Defendant as a liability. However, she did not list any claim against the Bank
2 as an asset of the bankruptcy estate. Further, she did not list Gerald Johnson as a co-
3 debtor on her debt to the Bank.

4 Gerald Johnson did not file for bankruptcy protection.

5 In her proposed Chapter 13 Plan, Ms. Johnson indicated that she wanted to pay
6 \$3,361.26 per month to Defendant directly as a mortgage payment.

7 On January 4, 2008, the bankruptcy court entered an order and notice dismissing
8 the Chapter 13 case due to Ms. Johnson's failure to comply with the Court's November 8,
9 2007 order. Nevertheless, on January 11, 2008, Ms. Johnson filed a motion to convert the
10 case to Chapter 7.

11 On January 16, 2008, Defendant, as creditor in the bankruptcy action, filed a
12 Motion for Relief from the Automatic Stay. (See Request for Judicial Notice, Exhibit 5).
13 This motion, which is set for hearing on February 6, 2008, seeks an order from the
14 bankruptcy court lifting the automatic stay and allowing the Bank to proceed with
15 foreclosure on the Real Property. A true and correct copy of the Note Secured by Deed of
16 Trust (Adjustable Interest Rate Loan - CODI Index) and Non-Construction Deed of Trust
17 and Assignment of Rents Adjustable Interest Rate Loan are attached as Exhibits 1 and 2
18 to the Motion for Relief from Automatic Stay.

19 To date, Ms. Johnson's bankruptcy case is still open.

20 **C. Grounds for Dismissing Complaint**

21 The Plaintiffs' complaint is flawed as a matter of law and cannot be amended in
22 any way to afford relief for the following reasons:

23 1. Documents of which this court can take judicial notice show that Gerald
24 Johnson was not a party to the Loan and therefore does not have standing to bring the
25 instant claim against the Bank.

26 2. As clearly set forth in the allegations of the Complaint, and in documents
27 of which this court can take judicial notice, Deborah Johnson is currently in bankruptcy,
28 and therefore does not have standing to bring the instant claim against the Bank, as the

1 claim belongs to the bankruptcy estate and must be brought by the bankruptcy trustee.

2 3. Plaintiffs' alleged claims are barred by the one year statute of limitations
3 set forth in 15 U.S.C. §1640(e).

4 II.

5 LEGAL ARGUMENT

6 Federal Rule of Civil Procedure 12(b) states, in relevant part, as follows:

7 Every defense to a claim for relief in any pleading must be asserted in the
8 responsive pleading if one is required. But a party may assert the following
9 defenses by motion: (1) lack of subject matter jurisdiction; . . . (6) failure to state
a claim upon which relief can be granted A motion asserting any of these
defenses must be made before pleading if a responsive pleading is allowed.

10 Federal Rule of Civil Procedure 12(d) states that:

11 If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are
12 presented to and not excluded by the court, the motion must be treated as one for
13 summary judgment under Rule 56. All parties must be given a reasonable
opportunity to present all material that is pertinent to the motion.

14 Pursuant to FRCP 12(b)(6), a motion to dismiss as presented here is proper
15 when the challenged pleading suffers either from "a lack of cognizable legal theory" or
16 "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v.*
17 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir 1990). As to the relevant burden of
18 proof, in deciding a motion to dismiss based upon FRCP 12(b)(6), because the court must
19 take all of the allegations of the pleading as true, a claim should not be dismissed unless it
20 appears beyond a doubt that plaintiff cannot prove any set of facts in support of the claim
21 entitling plaintiff to the relief requested. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2
22 L.Ed.2d 80 (1957).

23 "However, the court is not required to accept legal conclusions cast in the form
24 of factual allegations if those conclusions cannot reasonably be drawn from the facts
25 alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). In the
26 case at bar, Plaintiff's have summarily invoked the HOEPA and TILA without attaching
27 any loan documents, or even alleging that they were both borrowers of the Defendant
28 Bank.

1 When looking at the Plaintiffs' allegations against the standards set forth above,
 2 it becomes apparent that the Complaint is threadbare, defective on its face and easily
 3 refuted by documents of which this Court can take judicial notice.

4 **A. SINCE PLAINTIFF GERALD JOHNSON WAS NOT A BORROWER**
 5 **ON THE SUBJECT LOAN, HE LACKS STANDING TO MAINTAIN A CLAIM**
 6 **AGAINST THE DEFENDANT.**

7 In order to establish standing, a plaintiff must show that (1) he suffered an injury
 8 in fact; (2) he can trace the injury to the conduct of the defendant; and (3) the court can
 9 redress the injury to him by a favorable decision. *Skaff v. Meridien North America*
 10 *Beverly Hills, LLC* 506 F.3d 832 (C.A.9.Cal., 2007) citing U.S.C.A. Const. Art. 3, §2,
 11 cl.1. Further, standing is an aspect of subject matter jurisdiction. *Edwards v. First*
 12 *American Corp.*, 517 F.Supp.2d 1199 (C.D.Cal. 2007). If a party lacks standing, the court
 13 does not have jurisdiction as to that party. *Levina v. San Luis Coastal Unified School*
 14 *Dist.*, 2007 WL 455045 (C.A.9., Cal. 2007).

15 In the instant matter, the Plaintiffs' complaint attempts to allege jurisdiction by
 16 asserting that the Defendant violated the Truth in Lending Act ("TILA") and Home
 17 Ownership and Equity Protection Act ("HOEPA") "in regard to the Plaintiffs [sic]
 18 primary residence."

19 However, the TILA, as amended by the HOEPA (the "Acts"), applies to
 20 "consumers," which is defined by the Acts as "the party to whom credit is offered or
 21 extended." 15 U.S.C. 1602(h). Further, the Acts impose certain disclosure requirements
 22 to the "person who is obligated on . . . a consumer credit transaction . . ." and "to whom
 23 credit is extended." 15 U.S.C. §§ 1631 & 1635(f). In the transaction at issue, Gerald
 24 Johnson is not a "consumer" under the Acts.

25 According to the plain allegations of the Complaint, Gerald Johnson did not
 26 borrow any funds from Defendant Bank. (See Complaint, ¶4 (stating "Defendant
 27 qualified Plaintiff, Deborah E. Johnson, for the loan . . ."). Further, in her bankruptcy
 28 schedules, of which this Court can take Judicial Notice, Ms. Johnson lists her debt with

1 the Bank as a liability, but admits by omission that Gerald Johnson was not a co-debtor on
2 the loan. (See Req. For Jud. Ntc., Exhibit 1). In addition, the Note and Deed of Trust
3 which are the subject of the Plaintiffs' complaint in this action clearly show that Ms.
4 Johnson was the only borrower, and Gerald Johnson was not a co-borrower on the
5 relevant loan. (See Req. for Jud. Ntc., Exhibit 5 and exhibits "1" and "2" attached
6 thereto).

7 Thus, Plaintiff, Gerald Johnson, is not a "consumer" as defined by the TILA and
8 HOEPA. Defendant did not extend credit to Mr. Johnson, and he therefore could not have
9 suffered an injury as a result of any alleged "predatory lending" violations on the part of
10 the Defendant.

11 Consequently, as Plaintiff Gerald Johnson did not suffer an injury traceable to
12 the alleged conduct of the Defendant, and lacks standing to assert a claim against the
13 Defendant for violations of the TILA and HOEPA, the Court should grant Defendant's
14 Motion to Dismiss the Complaint filed by Plaintiff Gerald Johnson under FRCP 12(b)(1)
15 and 12(b)(6).

16 **B. PLAINTIFF DEBORAH JOHNSON LACKS STANDING TO**
17 **MAINTAIN A CLAIM AGAINST THE DEFENDANT BECAUSE SHE IS**
18 **CURRENTLY IN BANKRUPTCY AND HER CLAIM BELONGS TO THE**
19 **BANKRUPTCY ESTATE**

20 In the Complaint, Plaintiffs allege that "the damages to Plaintiffs' financial
21 status, caused by the Defendant's actions, are being handled within this district's
22 Bankruptcy Court." (Complaint, ¶2). *See also* Complaint, ¶6. The Court is further
23 requested to take judicial notice that Plaintiff Deborah Johnson, only, filed for bankruptcy
24 protection at Case Number 07-53614. (Req. for Jud. Not., Exh 1).

25 It is a fundamental rule of law that once an individual files for bankruptcy, her
26 property becomes the property of the bankruptcy estate. 11 U.S.C. §541(a). This includes
27 all legal or equitable interests of a debtor in property, "a phrase which has been
28 interpreted to include causes of action." *Sierra Switchboard Co. v. Westinghouse Elec.*

1 Corp., 789 F.2d 705, 707 (9th Cir. 1986). A bankrupt debtor's TILA claims, which
 2 existed pre-petition, are property of the bankruptcy estate. *Guerpo v. Amresco Residential*
 3 *Mortgage Corp.*, 13 Fed.Appx. 649, 2001 WL 777470 (9th Cir. Hawaii); *Rowland v.*
 4 *Novus Financial Corp.* 949 F.Supp. 1447, 1453. Further, a debtor lacks standing to assert
 5 a claim that belongs to the bankruptcy estate unless she can show that the claim is exempt
 6 from the bankruptcy estate or the bankruptcy trustee has assigned or abandoned the claim.
 7 *See id.*

8 In *Wherry v. All California Funding*, 2006 WL 2038495 (N.D. Cal.), a case
 9 glaringly similar to the case at bar, the plaintiff sought damages and an injunction from
 10 the court preventing the defendant from foreclosing on her property based on allegations
 11 that the defendant violated the TILA and HOEPA by failing to provide her with the
 12 required disclosures on the loan, and including a high pre-payment penalty. *Id.* at *1.
 13 The defendant in that case argued, *inter alia*, that because the property at issue was the
 14 subject of a motion for relief from stay pending in the bankruptcy court, the bankruptcy
 15 court had exclusive jurisdiction. *Id.* The court agreed and dismissed the plaintiff's case.
 16 *Id.* at *2.¹

17 The *Wherry* court further stated that even if it held that the bankruptcy court did
 18 not have exclusive jurisdiction over the property at issue, it would still have dismissed the
 19 plaintiff's TILA and HOEPA claims because she failed to demonstrate that those statutes
 20 applied to her loan with the defendant. *Id.* She failed to attached the note and deed of
 21 trust to her complaint, so the court could not determine if the proper disclosures were
 22 made by the defendant or not. *Id.*

23 Applying the facts and law of the *Wherry* case to the case at bar should yield the
 24 identical result. In the instant case, Plaintiff Deborah Johnson has filed for bankruptcy,
 25 and her motion to convert to Chapter 7, as well as Defendant's Motion for Relief from
 26

27 ¹ The court went on the state that its dismissal of the action was further bolstered by the
 28 "first to first rule," which allows a district court to dismiss an action when a similar complaint
 involving the same issues has already been filed in another federal court, including a
 bankruptcy court. *Id.* at *2, fn3.

1 Stay are currently pending in that court. *See id.* and Request for Judicial Notice, Exhibits
2 1, 4 & 5. Accordingly, Plaintiff Deborah Johnson lacks standing to maintain her TILA
3 and HOEPA claims, as these potential claims belong to the bankruptcy estate and at this
4 time, may only be brought by the bankruptcy trustee. *See id.*

5 Further, the merit (or lack thereof) is in itself a reason for this court to dismiss
6 Ms. Johnson's claim, since she failed to attach the relevant note and deed of Trust to her
7 complaint, and the court cannot make a determination as to whether there were any
8 violations of the subject Acts by the Defendant. *See id.*

9 Consequently, this Court has ample cause to dismiss Ms. Johnson's complaint
10 with prejudice pursuant to FRCP 12(b)(1) and 12(b)(6) and is respectfully requested to do
11 so.

12 **C. THE PLAINTIFFS' CLAIMS FOR DAMAGES UNDER HOEPA AND**
13 **TILA ARE BARRED BY THE ONE YEAR STATUTE OF LIMITATIONS**

14 In their Complaint, Plaintiffs' allege that they were contacted by an agent of the
15 Defendant in "March 2005" to enter into the subject loan. Further, the Note and Deed of
16 Trust attached as Exhibits "1" and "2" to the Motion for Relief from Stay filed by
17 Defendant as secured creditor in Ms. Johnson's bankruptcy show that the loan at issue
18 was made on May 5, 2005. (See Req. for Jud. Ntc., Exhibit "5" and exhibits "1" and "2"
19 attached thereto.) Thus, the loan at issue closed on or about May 5, 2005, and the
20 disclosures at issue were made prior to the May 5, 2005 date.

21 An action for damages under HOEPA or TILA must be brought within one year
22 of the violation. *See* 15 U.S.C. §1640(e); 12 C.F.R. §226.23; *In re Community Bank of*
23 *Northern Virginia*, 418 F.3d 277, 305 (3d Cir. 2005); *McMaster v. The CIT*
24 *Group/Consumer Finance, Inc.*, 2006 WL 1314379, at *4 (E.D. Pa May 11, 2006).
25 Further, the violation occurs when the consumer becomes contractually obligated on the
26 credit transaction. *McMaster*, 2006 WL 131479, at *4. Thus, the one year statute of
27 limitations begins to run on the date the loan closes. *Barbera v. WMC Mortgage Corp.*,
28 2006 WL 167632 (N.D. Cal.).

1 In the instant case, the Plaintiff's loan with Defendant closed on or before May
2 5, 2005. The instant action for damages under the TILA and HOEPA was not
3 commenced until January 15, 2008, well over one year from the loan closing date.
4 Accordingly, Plaintiffs' claim is barred by the statute of limitations and should be
5 dismissed by the court with prejudice pursuant to FRCP 12(b)(6).

6 III.

7 CONCLUSION

8 Based on the foregoing, Defendant FIRST FEDERAL BANK OF CALIFORNIA
9 respectfully requests that the Court grant its Motion to Dismiss for lack of subject matter
10 jurisdiction and failure to state a claim upon which relief can be granted, without leave to
11 amend, as the Complaint is fatally defective and cannot be corrected.

12 In the alternative, Defendant FIRST FEDERAL BANK OF CALIFORNIA
13 requests that the Court consider the above motion as a Motion for Summary Judgment
14 under FRCP 56 in light of the evidence submitted outside the four corners of the
15 Complaint, and enter summary judgment in favor of Defendant.

16 Finally, Defendant requests any further relief which this Court deems
17 appropriate.

18 DATED: January 28 2008

HEMAR, ROUSSO & HEALD, LLP

19
20
21 By:



22 PAMELA L. COX
23 Attorneys for Defendant
24 FIRST FEDERAL BANK OF
25 CALIFORNIA
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PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is Hemar, Rouso & Heald, LLP. ("the business") 15910 Ventura Boulevard, 12th Floor, Encino, CA 91436.

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit in the ordinary course of business.

On January 28, 2008, I served the foregoing document described as **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; MEMORANDUM OF POINTS AND AUTHORITIES AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT THEREOF** on the interested parties in this action by placing a true and correct copy thereof in a sealed envelope addressed as follows:

DEBORAH E. JOHNSON
PO Box 4448
Carmel, CA 93921-4448

GERALD D. JOHNSON (Pro Se, Filing Party)
PO Box 4448
Carmel, CA 93921-4448

XX At my business address, I placed such envelope for deposit with the ___ Federal Express or XX U.S. Postal Office by placing them for collection and mailing on that date following ordinary business practices.


___ I delivered such envelope(s) by hand to the offices of the addressees.

___ I caused such copies to be facsimiled to the persons set forth.

XX (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___ (Federal) I declare under penalty of perjury under the laws of the United States of America that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 28, 2008 at Encino, California.


SANAZ ADNANI